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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Petitioners,

v.

CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF U.S. SENATORS HERB KOHL, ARLEN SPECTER AND RUSSELL FEINGOLD AS AMICI CURIAE IN SUPPORT OF PETITIONERS

BRADY C. WILLIAMSON *
DEBBIE K. LERNER
LAFOLLETTE & SINYKIN
Suite 500
One East Main Street
Madison, Wisconsin 53703
(608) 257-3911
Counsel for Amici Curiae

* Counsel of Record

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INTEREST OF AMICI CURIAE

Herb Kohl, Arlen Specter and Russell Feingold are United States Senators who, as citizens, legislators and members of the Senate Committee on the Judiciary, share a direct interest in the integrity of the census.[1] The decision, by a divided panel, of the court of appeals in *City of New York v. U.S. Department of Commerce*, 34 F.3d 1114 (2nd Cir. 1994), *cert. granted*, 64 U.S.L.W. 3238 (Sept. 27, 1995), questions not only that integrity but the countless decisions made, since 1991, by local, state and federal governments relying on the census for its accuracy and fairness.

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[1] Senator Kohl was, until 1993, the Chairman of the Subcommittee on Government Information and Regulation of the Senate's Committee on Governmental Affairs, which has oversight jurisdiction of the census.

A decision by this Court to affirm the court of appeals would lead, inexorably, to a reapportionment of the Congress and, directly, to the mid-decade loss by Wisconsin and Pennsylvania of seats in the U.S. House of Representatives and their corresponding votes in the electoral college. *Id.* at 1122. Moreover, the harsh consequences of the court of appeals' decision would reach every level of government and every citizen for they have properly relied, for the last four years, on the accuracy of the 1990 census to conduct the public's business and to ensure "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

The principal petitioner and the principal respondent have consented to the filing of this brief, and their letters of consent are on file with the Clerk of the Court pursuant to Rule 37. With the United States and the States of Wisconsin and Oklahoma (in Case Nos. 94-1614 and 94-1631, respectively, which have been consolidated with this case), amici request that this Court reverse the decision of the court of appeals, thereby affirming the district court's judgment and the 1991 decision by the Secretary of Commerce that declined to use statistical sampling to adjust the results of the census.

SUMMARY OF ARGUMENT

The Constitution, in Article I, section 2, mandates an "actual enumeration" of the country's population every 10 years. The census serves two related and equally compelling purposes: to count the population and to locate the people of this country by state and political subdivision. The results of the census determine the apportionment of the House of Representatives, the number of presidential electors for each state, the shape of state legislative districts, and boundaries for county and city elections. In addition, Congress and the executive branch rely on the decennial census to allocate federal funds to state and local governments. The census, in this federalist

system, provides nothing less than distributive fairness in a country of 250 million people.

The census is an enumeration, an individual count under the Constitution of the "whole number of persons in each state," not a statistical survey or poll. And it is imperfect. Long before the 1990 census, there was controversy over whether statistical sampling procedures should be used to adjust the results for the miscounting that occurs in every census. For at least 50 years, concern has grown about undercounting, particularly "differential undercounts" (higher undercount rates for certain racial and ethnic minority groups than for non-minorities). That has led to repeated proposals, repeatedly rejected by Congress and the courts, to alter or statistically "adjust" the decennial census data to "improve" their accuracy.

The precise number of people and their distribution within the United States can never be determined with absolute certainty. The size of the country, its heterogeneity, and the mobility of its population over a large area make that impossible. Some people are unwilling to be counted while others are unable to complete the census forms. Given the complexity and inherent imperfection of any census, the question for this Court is whether the administrative decision not to adjust the 1990 census was within the range of choices constitutionally available to the federal government through the Department and Secretary of Commerce. Indeed, the dispositive question is not whether there was an undercount, but whether it is possible to "remedy" an undercount without damaging the accuracy, the credibility and the distributive fairness of the census.

Any decision to adjust the census cannot be based solely on the possibility, or even the certainty, that the statistically-adjusted result might reflect more accurately the *total* population of the country or any particular state. Adjusted totals must, if they are to supplant the census, reflect as well a more accurate distribution of the relative

population among the states, counties, cities, wards, and precincts of the United States. The Secretary's decision in 1991 to leave the census intact rested on persuasive evidence that the proposed adjustments failed to improve—and, indeed, probably would undermine—the accuracy of the population distribution among the states. The court of appeals improperly applied strict scrutiny to the Secretary's decision, mistakenly equating a dispute over "equal representation" with a dispute between statisticians. Yet under *any* standard of review, strict or deferential, the Secretary's decision should be affirmed.

The proposed adjustment at issue here would sacrifice distributive accuracy—"fairness," the district court said, *City of New York v. U.S. Department of Commerce*, 822 F. Supp. 906, 924 (E.D.N.Y. 1993) (*City of New York III*)—on the altar of an unattainable statistical ideal for the country as a whole. The adjustment would "count" six million unidentified people yet "discount" more than 900,000 people actually counted and identified by the census. If the census were now adjusted, the record suggests the population of 29 states arguably would be more accurately reflected, but the population count in the remaining 21 states would become less accurate and, accordingly, less fair. Administrative decisions can turn on these statistical distinctions, but constitutional decisions should not.

PROCEDURAL BACKGROUND

Statistical adjustment, which has had its advocates since the 1950s, first became a major issue for the 1980 census. *See* JENNIFER D. WILLIAMS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, DECENNIAL CENSUS COVERAGE: THE ADJUSTMENT ISSUE 5 (1994) (the "CRS Report"). On May 13, 1980, the Secretary of Commerce directed the Census Bureau to decide whether to adjust the 1980 census results. Declining to do that, the Bureau maintained that its "coverage improvement programs had been successful and that there was no accurate method available to adjust the population data."

Id. at 6. The Bureau stressed the need for continuing research on undercount measurement. *See* U.S. Library of Congress, *Adjusting the 1990 Census*, p. 6.

Following the announcement, more than 50 lawsuits were filed, most asking the courts to order the census statistically adjusted. In one case, *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *decided sub nom., Cuomo v. Baldridge*, 674 F. Supp. 1089 (S.D.N.Y. 1987), the State of New York alleged that, because of the 1980 undercount of African-Americans and Hispanics, it lost a congressional seat and millions of dollars in federal funds. The court affirmed the Census Bureau's conclusion that adequate census adjustment methodology had not been developed. *Id.* at 1107; *see* U.S. Library of Congress, *Adjusting the 1990 Census*, p. 7.

For the 1990 census, the Census Bureau created an Undercount Steering Committee and staff to address the undercount issue. The Bureau also solicited opinions on adjustment from outside experts and organizations including the American Statistical Association and the National Academy of Sciences. *See City of New York III*, 822 F. Supp. at 913-14. On October 30, 1987, however, the Commerce Department announced that it did not intend to adjust the 1990 census for a number of reasons, including the inherent subjectivity and questionable reliability of the adjustment process.

Within a year, the plaintiffs sued to enjoin the 1990 census, challenging its methodology and seeking to reverse the administrative decision against adjustment. The Department of Commerce, its Secretary, the Census Bureau, President George Bush and other public officials, all defendants, moved to dismiss the case, but the U.S. District Court for the Eastern District of New York concluded that the plaintiffs had standing to challenge the census on constitutional grounds. *City of New York v. U.S. Department of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989) (*City of New York I*). The district

court also ruled that it would review the Secretary's decision not to adjust the 1990 census under the "arbitrary and capricious" standard of review established by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982) ("APA"). *See City of New York I*, 713 F. Supp. at 54.

The parties ultimately agreed that the Commerce Department would vacate its 1987 decision against the prospective census adjustment—provided that Robert A. Mosbacher, then Secretary of Commerce, would decide by July 15, 1991 "*de novo* and 'with an open mind' whether adjustment was warranted." *City of New York III*, 822 F. Supp. at 915. The stipulation acknowledged the Commerce Department's program to gather the statistical data necessary for an adjustment, and the Department established "guidelines" for the Secretary's decision. With the stipulation, the parties also created an eight-member Special Advisory Panel of statistical and demographic experts with the plaintiffs naming four of the experts.

The plaintiffs then challenged the Department's guidelines as vague and inadequate and sought a declaratory judgment that a statistical adjustment would not violate the Constitution or any federal statute. The defendants again responded that the plaintiffs' challenge presented a nonjusticiable political question. In *City of New York v. U.S. Department of Commerce*, 739 F. Supp. 761, 767-68 (E.D.N.Y. 1990) (*City of New York II*), the district court again rejected the political question defense and concluded that statistical adjustment *per se* would not violate the Constitution or federal law.

On July 15, 1991, with the case pending, Secretary Mosbacher announced that the 1990 census would not be adjusted. *See* 56 Fed. Reg. 33582 (the "Decision"). Appearing before the census subcommittee of the House of Representatives' Committee on the Post Office and Civil Service, Mosbacher testified that "[a]fter a thorough review, I find the evidence in support of an adjustment to

be inconclusive and unconvincing." *Oversight Hearing to Review Census Adjustment Decision: Hearing Before the Subcomm. on Census and Population of the House Comm. on the Post Office and Civil Service*, 102d Cong., 1st Sess. 13 (1991) (testimony of Robert A. Mosbacher).[2]

The district court tried the case for more than two weeks in 1992, hearing a wide variety of testimony and evidence. In an April 13, 1993 decision, Judge Joseph M. McLaughlin declined to overturn the Commerce Department's decision against adjustment and held that the Secretary's decision, construed in light of constitutional requirements, was not "so beyond the pale of reason as to be arbitrary or capricious." *City of New York III*, 822 F. Supp. at 929.

On July 6, 1993, the plaintiffs appealed the decision to the U.S. Court of Appeals for the Second Circuit. Vacating and remanding the district court's decision, the appellate court concluded last year that "given the concededly greater accuracy of the adjusted count, the Secretary's decision was not entitled to be upheld without a showing by the Secretary that the refusal to adjust the census was essential to the achievement of a legitimate governmental objective." *City of New York*, 34 F.3d at 1124. This Court granted the petitions for a writ of certiorari on September 27, 1995.

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[2] Following the Secretary's decision not to adjust the 1990 census, the States of Wisconsin and Oklahoma intervened as defendants in the New York district court case. Wisconsin had filed suit in the U.S. District Court for the Western District of Wisconsin to enjoin the proposed adjustment, but the state voluntarily dismissed the case following the Secretary's decision. *State of Wisconsin v. U.S. Department of Commerce*, No. 91-C-0542-C (W.D. Wis. 1991).

ARGUMENT

The court of appeals erred, fundamentally, when it characterized the Secretary's decision as conceding the "greater accuracy of the adjusted count." In fact, the Secretary's only concession was to acknowledge the obvious: the statistical adjustment might well improve the total count for some purposes and in some areas, but for many—if not most—purposes, the census itself provided the more accurate count. Ultimately, the Secretary concluded that the evidence in support of an adjustment was both inconclusive and unconvincing:

> In attempting to make the total count more accurate by an adjustment, the relative count among the states would become less accurate with about 21 states adversely affected.
>
> Many large cities received less accurate treatment under an adjustment.
>
> Fully one third of the population lives in areas where the *census* appears more accurate and, as population units become smaller, the adjusted figures become increasingly unreliable.
>
> And, finally, when the Census Bureau made allowances for factors not yet estimated, the census enumeration in 28 or 29 states became less accurate "as adjusted."

Decision at 1-1 - 1-5. Any one of these factual conclusions, standing alone, would support the Secretary's conclusion and the district court's decision affirming it. Taken collectively, however, the facts more than meet even the Second Circuit's demanding (and erroneous) requirement that the decision not to adjust the census be "essential" to achieve a legitimate governmental objective. The Secretary's decision not to adjust the 1990 enumeration applies and protects the constitutional principles of fairness, accuracy and integrity that underlie the decennial census.

I. THE PROPOSED ADJUSTMENT WOULD NOT, IN FACT, MAKE THE CENSUS MORE ACCURATE.

An adjustment is not a recount. It is, at best, an estimate—albeit an educated one—about who was missed in the actual census. There is a general consensus among statisticians and demographers who oppose adjustment that the process of estimating the undercount is, itself, very uncertain. Assuming that minorities were disproportionately undercounted, in a census that actually counted more than 98 percent of the population, then they will likely be undercounted at even higher rates in a post-census survey that samples a much smaller segment of the population. That is particularly true where, as here, the post-census survey depends entirely on census employees canvassing residential areas rather than on individual household participation in the process.

There have been many attempts—in Congress and in the courts, before and after the 1990 census—to require the Census Bureau to adjust the census results to "correct" the undercount. The two other circuits that have addressed this issue agreed with the district court in this case.[3] No attempt had succeeded until the Second Circuit's decision, and with good reason. The director of the census may have put it best: "Adjustment is an issue about which reasonable men and women and the best statisticians and demographers can disagree." BARBARA EVERITT BRYANT, RECOMMENDATION TO SECRETARY OF COMMERCE ROBERT A. MOSBACHER ON WHETHER OR NOT TO ADJUST THE 1990 CENSUS 3 (1991) (the "Bryant Report"). That is precisely why the Secretary's administrative decision should stand and the census should remain intact.

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[3] *See City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1217 (1994); *Tucker v. U.S. Department of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 407 (1992).

A. The Enumeration Is Accurate.

The 1990 census counted 248,709,873 people in the "actual enumeration" required by the Constitution. In his report to the Secretary of Commerce, one member of the Special Advisory Committee summarized the critical difference between the census itself and the proposed adjustment:

> Adjustment numbers are no more than estimates, just as the Census numbers are estimates. The difference is that Census estimates are based on a physical count—at least some sort of reality—while adjusted numbers are not. Since the Census correctly enumerated 98.8% of the population—a percentage that is well within the margin of error for a survey of this size—there is no reason to use an adjustment that has a greater margin of error.

J. MICHAEL MCGEHEE, REPORT TO SECRETARY ROBERT A. MOSBACHER ON THE ISSUE OF ADJUSTING THE 1990 CENSUS 3 (1991) (the "McGehee Report").

The first step in the 1990 decennial census was an enumeration, an attempt actually to count every person residing in the United States on April 1, 1990 by mailing census questionnaires to addresses compiled by the Census Bureau. Residents were asked to complete the questionnaire and return it by mail. To independently evaluate and assess the quality and coverage of the census, the Census Bureau used two statistical measurements: the post-enumeration survey (the "PES") and a demographic analysis (the "DA").

The PES is a sample survey developed in the 1980s to provide additional geographic and ethnic information about the people missed in the census. The Census Bureau conducted a survey of approximately 165,000 housing units in 5,290 census blocks or small block clusters shortly after the 1990 census. Interviewers went to every household on the sample blocks to collect basic information.

These survey records were then matched against the census data for those blocks to determine who had been missed or erroneously included in the census. Following the matching process, the Census Bureau developed undercount factors for 1,392 groups based on census division, type of place of residence, tenure of residence, race, ethnicity, gender, and age. Decision at 2-13. Using an intricate combination of statistical models, the Bureau then drew inferences about the number of people missed by the census and their location. The Secretary's ultimate decision not to adjust the census was based, in part, on the uncertain quality of the PES and the inferences drawn from it.[4]

The second population measurement, demographic analysis, takes information from administrative records (previous censuses, birth and death certificates, and immigration and emigration forms) to develop an independent estimate of the population at *a national level.* Historically, both this type of post-census research and surveys like the PES had been used only for evaluation purposes and to plan the next census rather than, as proposed here, for adjusting the most recent one. *See* Bryant Report at 5.

The official 1990 census of the resident population (the civilian plus U.S. Armed Services population living in the United States) counted 248.7 million people. The Census

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[4] The PES methodology attempts to count people twice, in selected areas, and then compares the results from one count and set of records (the census) with the results from the other count and set of records (the PES compiled by interviewers):

> As a result, not only do the enumeration errors affect the quality of both sets of numbers, but the problems associated with matching records between the PES and the Census must also be taken into account; e.g. Do women match better than men?; Do matchers in Kansas City do a better job than those in Albany?; . . . Are there more people to match in Albany than in Kansas City?

McGehee Report at 10.

Bureau's estimates from its demographic analysis indicated a net undercount of about 4.7 million people, almost 1.9 percent of the total population. The Bureau's estimates from the PES initially suggested a net undercount of 5.3 million or 2.1 percent of the 1990 total population. Subsequent research and the discovery of a computer error, however, revised the PES undercount to just 1.6 percent of the population. *See* CRS Report at 11-12.

There is an obvious difficulty in using PES or DA-based data to "correct" any undercount in the 1990 census—the corrections suggested by each method are substantially different and, indeed, contradictory. A PES adjustment to the census would move many subpopulation totals in precisely the opposite direction of an adjustment based on demographic analysis:

- An adjustment based on the PES will add 180,318 non-black males age 19 while the DA suggests that 136,908 be deleted from the count.
- A PES adjustment will delete 91,631 males over the age of 65 while DA would add 192,950.
- An adjustment based on the PES will add 375,053 females age 10-19 while DA indicates that 7,141 should be deleted.
- While DA indicates that 146,255 females over the age of 45 should be added, the PES would delete 245,253 of them.
- An adjustment based on the PES would add 1,055,826 more females than would DA. If the demographic analysis were correct, and the enumeration adjusted, the official population would have a .82 percent overcount of females imbedded in it.

See Decision at 2-10, 2-12.

In his decision, the Secretary found another comparison disturbing: every group of black males (except those age

10-19) was substantially undercounted by the PES when compared with DA. Accordingly, the PES-based undercount rates are substantially smaller. An adjustment based solely on PES would add 804,233 black males to the population while, under demographic analysis, the number of black males that theoretically should be added to the population is 1.33 million. For black females, the PES adjustment would add 29,390 fewer people. Even assuming for purposes of argument that DA estimates are more precise, however, DA could not be used to add the people missed by the PES to the census count because there is no way to determine where—in what state or county or city—to locate them. *See id.*

Ultimately, Secretary Mosbacher decided that neither accuracy nor fairness—both vital to the credibility and effectiveness of the decennial census—would be enhanced by the application of either a PES- or DA-based adjustment:

> [I]ncreased accuracy for census counts means not only increased accuracy in the *level* of the population, but also increased accuracy of the *distribution* of the population in states and localities. In particular, for the primary uses of the census—apportionment and redistricting—the share or fraction of the total population in a given state, city or precinct is critical. It is this fraction that determines political representation and the amount of Federal funds allocated across political jurisdictions. The paradox is that even if you improve the accuracy in the *level* of the population in any given city by adding at least some of the people missed in the census, you do not necessarily improve and can worsen accuracy in the *share* of the population in that city.

Id. at 2-11 (emphasis in the original).

Although the 1990 census may have undercounted several million Americans, no one can say with any confidence where those people are. The PES did *not* sample individual states or counties or cities. Without that infor-

mation, statistical surveys provide little reliable information to adjust the census fairly to reduce the impact of under-enumeration, or other sampling errors, at the national, state or local level.

After his July 15, 1991 decision, the Secretary testified at several congressional hearings that there simply was insufficient statistical precision in the adjusted counts to warrant their use instead of the original enumeration. That was at the heart of his decision. There was expert consensus, the Secretary said, that the adjusted numbers were less accurate on the block level. Even at the state level, moreover, there was uncertainty about which was more accurate, the original census or the adjusted counts. Referring to the people missed by the census, Secretary Mosbacher noted that the "implicit assumption" in adjusting the count is that "they are spread over the country in the same way as the post-adjustment population." Yet, he said, that "assumption has no empirical foundation." *Id.*

The Census Bureau analysts essentially concentrated on whether there was sufficient information to reduce the error in the numeric counts—without regard to whether that increased or decreased the severity of differential undercounts across geographical areas. "That is," the Secretary said, "they interpreted accuracy as concerned with getting the number of people closer to the truth rather than getting the allocation of the population for the purposes of political representation and funding closer to the truth." *Id.* at 2-24. The adjusted counts were less accurate than the enumeration, the Secretary concluded, and distributive accuracy would actually be impaired if the census were adjusted:

> [T]he Constitutional and legal purposes for the census must take precedence, and accuracy should be defined in terms of getting the proportional distribution of the population right among geographical and political units. This argues for putting aside the judgment of accuracy based on getting absolute num-

> bers right (numeric accuracy) and instead focusing on the question of whether there is convincing evidence that the accuracy of the population distribution in the adjusted numbers (distributive accuracy) is superior to the distributive accuracy of the actual enumeration.

Decision at 2-25. Senator Kohl reiterated precisely that point in his statement to the Senate Committee on Governmental Affairs on November 13, 1991: "[T]he most important question is this, can we prove that adjusted Census numbers are more accurate than the original numbers? Unless that question can be answered with an unequivocal yes[,] it would be *irresponsible and unfair* to adjust the numbers." (Emphasis added.) *Dividing The Dollars: Issues in Adjusting Decennial Counts and Intercensal Estimates for Funds Distribution, Hearing Before the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs,* 102d Cong., 2d Sess. 20 (1992) (statement of Sen. Kohl).

At a minimum, the first guideline adopted by the Department of Commerce for the census establishes a rebuttable presumption that the unadjusted census figures provide the most accurate count. The burden of proof falls on the proponents of "adjustment" to demonstrate otherwise.

> The Census shall be considered the most accurate count of the population of the United States, at the national, State and local level, unless an adjusted count is shown to be more accurate.

Decision at 2-5. The mandate of this guideline is unambiguous. In the absence of evidence establishing that adjusted estimates are more accurate than the census—at the national, state and local level both in relative and in absolute terms—the census counts are presumed more accurate. The Secretary of Commerce found that evidence wanting or unavailable in 1991, and it remains so today.

In affirming Secretary Mosbacher's decision not to adjust the 1990 Census, Judge McLaughlin emphasized the importance of distributive fairness:

> The Secretary's decision to focus on distributive, rather than numeric, accuracy was consonant with the constitutional goal of assuring the most accurate census practicable, given the census's function as a standard by which to distribute political representation and economic benefits. . . . [T]he Secretary's concern that "with respect to places under 100,000 population, there is no direct evidence that adjusted counts are more accurate" was legitimate, given Guideline One's requirement that the adjusted counts be shown to be more accurate at the local level. Decision at 2-30.

City of New York III, 822 F. Supp. at 924. The census is not an academic exercise, in other words, but a constitutional responsibility of the federal government that literally shapes the political and social structure of this country. Census decisions are reviewable in that context, whether under the APA or a more demanding standard, not as part of the search for statistical perfection.

B. Adjustment Produces More, Not Less, Uncertainty.

The procedures proposed to adjust the census are novel, experimental at best. *See* Decision at 1-7. "Such research deserves and requires careful professional scrutiny," Secretary Mosbacher concluded, "before it is used to affect the allocation of political representation." *Id.* State demographic officials responding to a 1991 poll on the adjustment issue overwhelmingly opposed adjustment. A smaller group of statisticians and demographers were evenly split on adjustment—for, against, and undecided—with one expert quoted as describing adjustment, candidly, as "a statistician's sandbox." *Adjustment Again? The Accuracy of the Census Bureau's Population Estimates and the Impact on State Funding*

Allocations, Hearing Before the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. 3 (1992) (statement of Sen. Glenn).

Following the decision not to adjust the 1990 census, the Senate's Governmental Affairs Committee concluded that:

> There is no new information to suggest that adjusting the census is any more accurate or feasible now than it was last July [1991]. Since then we have discovered that the adjusted numbers published at that time were incorrect. Thus we conclude that accurately adjusting the census to correct for the undercount is not possible.
>
> . . . .
>
> In sum, the post-enumeration survey should be viewed as a major experiment in understanding the characteristics and geographic distribution of persons missed in the census. That experiment should be evaluated in an effort to reduce the undercount in the 2000 census. . . . [T]he time available in 1990 was insufficient to both develop the adjustment model and carry out the complicated procedures required by that model. Rather than lock onto a model that is inherently flawed, the PES can be used to develop models for future use that are more robust and less sensitive to minor changes in assumptions.

Dividing The Dollars: Issues in Adjusting Decennial Counts and Intercensal Estimates for Funds Distribution, Report Prepared by the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. 3 (1992). J. Michael McGehee, a member of the Advisory Panel, explained in his report that the problem with statistical census adjustments was that the verification of results had proven that "adjustment formulas were highly inaccurate. Twenty-six Census Bureau studies of the Post Enumeration Survey . . . and Demographic Analysis . . .

which form the Dual System Estimate (DSE) methodology[,] have shown that they are no more accurate than current Census practices." *See* McGehee Report at 2.

In concluding that the 1990 census should not be adjusted, the Secretary considered the shortcomings generally inherent in statistical formulations—that any statistical formula attempting to establish precise populations would be based on assumptions, assumptions that are subjectively chosen and weighed, assumptions that might be wrong. In addition, the Secretary considered the fact that adjusted numbers are no more than estimates and—unlike the enumeration, which is based on an actual count—entirely the product of statistical inferences with no correspondingly direct basis in reality.

Since statistical assumptions are the foundation upon which confidence in the "final" adjustment rests "[a] politically 'better' count cannot be defended if it is shown that the assumptions on which it rests are changeable." *Id.* at 6. Even small changes in statistical models result in different population estimates. Consider the results of two adjustment processes released by the Census Bureau on June 13, 1991. Although the technical differences between them were minor, the differences in results were substantial and, in terms of apportionment and equal representation, extraordinary.

Under one plan, two seats in the House of Representatives moved while under the other method only one seat moved. *See* Decision at 1-5. Similarly, one expert found that among five reasonable alternative methods of adjustment, none of the resulting apportionments of the House of Representatives were the same, and 11 different states either lost or gained a seat in at least one of the five models. *Id.* at 1-5 - 1-6. In view of these facts, Secretary Mosbacher found it unsettling that a subjective choice of statistical methodology can create such a dramatic practical difference in apportionment. *Id.* at 1-6.

The only acceptable rationale for a decision to adjust the census would be to correct a demonstrable inequity. No inequity can be corrected, however, unless the statistical quality of the numbers can be assured. That is not possible with respect to the 1990 adjustment because those numbers rely on statistical methods that are untested, unstable and unverifiable. Dr. Michael R. Darby, then Under Secretary of Economic and Statistical Affairs and one of the Advisory Panel members, summarized the decision not to adjust in familiar terms:

> [M]y conclusion was that it certainly was not proven that the adjustment would improve the accuracy, and it may well worsen the accuracy and treat people less fairly.
>
> . . . .
>
> If we miss four million people and we don't know where they live, putting them into some other block than where they live doesn't really help them or help fairness. Some people get too much and other people still get too little, and it can make things worse.

Review and Evaluation of Secretary Mosbacher's Decision on the 1990 Census Adjustment, Hearing Before the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs, 102d Cong., 1st Sess. 9-10 (1991) (statement of Dr. Darby).

II. ADJUSTMENT WOULD DISCOURAGE CITIZEN PARTICIPATION IN THE CENSUS AND ENCOURAGE THE POLITICIZATION OF THE CENSUS.

The success of the 1990 census, based on a mail out/mail back format, depended on the widespread and voluntary participation of the people. *See Baldridge v. Shapiro,* 455 U.S. 345, 354 (1982). The most accurate method for locating and counting the people of the United States is to ask each household to submit information about the number of people living there. When people fail to submit the requested information, the Census Bu-

reau must send enumerators (field workers) to canvass neighborhoods house-to-house to learn how many people live in each one. Data collected by enumerators can never be as accurate as data submitted voluntarily. *See* U.S. GENERAL ACCOUNTING OFFICE, DECENNIAL CENSUS: 1990 RESULTS SHOW NEED FOR FUNDAMENTAL REFORM 3 (1992) (the "GAO Report"). As voluntary participation in the census declines, there is necessarily greater dependence on data collected by enumerators. The more data enumerators have to collect, however, the more likely they are to miss and miscount people, and the more inaccurate the census becomes.[5] *Id.* at 47. Accordingly, the GAO concluded, "[a] high level of public cooperation is the key to obtaining accurate data at a reasonable cost." *Id.* at 35.

A Any Statistical Adjustment Would Lead To Declining Participation In The Census.

The Secretary decided not to adjust the 1990 census based, in part, on his concern about the effect an adjustment would have on future census participation:

> [A]n adjustment would remove the incentive of states and localities to join in the effort to get a full and complete count. The Census Bureau relies heavily on the active support of state and local leaders to encourage census participation in their communities. Because census counts are the basis for political representation and federal funding allocations, communities have a vital interest in achieving the highest possible participation rates. If civic leaders and local

[5] Low participation leads to increased costs as well as errors. Voluntary participation by mail in the 1990 census was lower than in previous censuses and, as a result, the Census Bureau had to hire over 300,000 enumerators. *See* GAO Report at 45. That follow-up is expensive: in constant dollars, the Census Bureau spent 65 percent more on the 1990 census than on the 1980 census. *Id.* at 4. The increasing costs of the census are due, at least in part, to declining participation. *Id.* at 24.

> officials believe that an adjustment will rectify failures in the census, they will be hard pressed to justify putting census outreach programs above the many other needs clamoring for their limited resources.

Decision at 1-6 - 1-7.

> Currently, it is in the interests of every governor, mayor, and interest group to help get their target populations counted. . . . The[ir] efforts include mapping, address compilation, massive advertising campaigns, and public awareness activities . . . [that] are absolutely critical to the Census Bureau's mission to conduct an actual enumeration. . . . [A]n adjustment would remove the incentive that these public officials and groups currently have to provide active support in achieving a complete count.

Id. at 2-59. "Without the partnership of states and cities in creating public awareness and a sense of involvement in the census," the Secretary concluded, "the result is likely to be a further decline in participation." *Id.* at 1-7.

The 1990 census provides a stark example of how adjustment would penalize a high rate of census participation. Prior to the census, Wisconsin undertook a statewide public awareness campaign and targeted outreach program that resulted in the highest census participation of any state. The state's efforts included a matching grant program aimed at traditionally undercounted groups. *See* Nancy Hurley, *Winding Up Wisconsin's Census Efforts*, WISCONSIN COUNTIES, Dec. 1990, p. 36 ("Hurley"). To qualify for grants, municipalities submitted proposals targeting "hard-to-enumerate" groups including racial and ethnic minorities, people with limited English-speaking ability, the homeless, migrant workers, homebound individuals, students and people living in public housing or other concentrations of rental units. *See Wisconsin's Census Awareness Campaign*, THE 1990 CENSUS, A WISCONSIN HANDBOOK, p. 17.

As a result, Wisconsin had the highest voluntary census mail response rate in the country: 75 percent of the Wisconsin households that received a census questionnaire in the mail completed and returned the form, compared with about 64 percent nationwide. *See* Hurley at 36. Yet despite that accomplishment, formally recognized by the Census Bureau, the state stands to lose a seat in the House of Representatives and a portion of its share of federal funds if the census is adjusted. *City of New York*, 34 F.3d at 1122. The state would suffer that loss precisely *because* of its relatively low estimated undercount compared with other states. Faced with this example, how many state and local officials will choose to allocate their declining resources to programs designed to encourage participation in the next census?

The Census Bureau can estimate how many people were missed or erroneously included in the census, but it has no way of knowing where those people actually live. Accordingly, local officials in many census subdivisions will have even less reason to encourage citizen participation because it would reduce the high error rates that the adjustment process otherwise would "assume" affected their counts. Those error rates would lead to a higher estimated population under an adjusted census and, thus, a greater share of political representation and federal funds.

The statistical adjustment rejected by the Secretary uses sampling methods to assign people, assumed erroneously included or omitted from the census, to specific geographic areas. That process is based on the known error rate in counting similar people in similar communities within the same census division, though not necessarily the same state. Thus, an area with particularly high error rates will drive up the error rates imputed to all of the communities within the same census division. Since the census results for those communities would then be adjusted to show additional people, com-

munity leaders would be foolish to risk greater political representation and federal funding by encouraging the very participation that will reduce the error rates.

Adjustment also threatens public confidence in the census, adversely affecting citizen participation. The public no doubt will question why the government spent $2.6 billion to conduct a head count that produced results inaccurate enough to require "adjustment" by a statistical formula. Adjustment necessarily implies that the census itself is significantly flawed, that the federal government has unwisely spent tax dollars, and that there is no need to be counted voluntarily because statisticians eventually will "count" everyone even if they choose not to participate in the census. Ultimately, the reduced accuracy and diminished integrity of the census will erode public confidence in government, lead to lower citizen participation and, in turn, to a further decline in census accuracy and to doubling the cost of the next decennial census.[6]

B. Statistical Adjustment Would Permit Political Manipulation.

Another concern raised by the Secretary was the possibility of political manipulation. Any adjustment methodology selected by the Census Bureau involves a number of subjective assumptions. As the assumptions vary, the results vary:

> [T]he choice of the adjustment method selected by Bureau officials can make a difference in apportionment, and the political outcome of that choice can be known in advance. I am confident that political considerations played no role in the Census Bu-

[6] If the trend in public cooperation continues, the national mail response rate could be as low as 55 percent in the year 2000. This would generate a corresponding increase in the Census Bureau's workload of nearly 50 million cases. Under this scenario, the Bureau's planning staff has estimated, the 2000 census could cost $4.8 billion in current dollars. *See* GAO Report at 41.

> reau's choice of an adjustment model for the 1990 census. I am deeply concerned, however, that adjustment would open the door to political tampering with the census in the future.

Decision at 1-6. Depending on the assumptions in a particular statistical model, the resulting adjustment will literally move Congressional seats from one state to another:

> Adjustment of census numbers, as it is devised at this point, is unfortunately subject to not only the charge but the actual fact of political manipulation. . . . The present adjustment process is subject to many "inside" assumptions and innumerable decisions by individuals about where to draw the sample, how to determine the various strata, what mathematical formulae to use, to name only a few of the important decisions. *It is certainly not hard to imagine that such a process, especially when cloaked in the mysteries of statistical complexity, could easily be corrupted and manipulated, particularly if it should become accepted practice and not subject to rigorous public examination, as is the case for the present decision.* (Emphasis in original.)

V. LANCE TARRANCE, JR., REPORT TO THE SECRETARY OF COMMERCE 29 (1991).

No individual can affect the outcome of the census enumeration, nor could the federal government directly manipulate adjusted census counts for political gain. "By contrast, a statistical adjustment of the census involves discretion in the selection of methods that can produce a wide variety of results. This permits government officials to know the political outcome of the chosen method in advance." MICHAEL R. DARBY, RECOMMENDATION TO THE SECRETARY ON THE ISSUE OF WHETHER OR NOT TO ADJUST THE 1990 DECENNIAL CENSUS, E-1 (1991). The concerns expressed by these and other experts justify the Secretary's decision. Rather than embark on a path

of unknown political possibilities with adjustment, he determined that the federal government's efforts and resources would be better spent developing a census-taking procedure that would reduce the problem of differential undercounts.

III. THE RELIEF GRANTED IN THIS CASE, IF ANY, SHOULD BE PROSPECTIVE.

This Court should reverse the court of appeals and remand the case to be dismissed with prejudice. If this Court nevertheless affirms the court of appeals' decision, any relief granted here or, on remand, by the district court, should be prospective. Indeed, any relief granted should be effective with the year 2000 census.

A retrospective adjustment of the 1990 census would disrupt program allocations and program planning for many states—at both the state and local level. State, county and municipal agencies use decennial census data for the planning and management of health and human service programs as well as for other "need" and "population" based programs. Political districting and political representation at the state and local levels have already been put in place based on the 1990 census data.

Many states, including Wisconsin and Pennsylvania, have allocated funds based on the 1990 census data. To change the base of the census numbers in mid-decade would significantly disrupt the delivery of social services, particularly in those states that would lose a substantial amount of federal funds. Litigation soon would follow, no doubt, to recover funds "overpaid" since 1991. Using the General Accounting Office's estimates of fiscal impact, for instance, Pennsylvania would lose $40 million and Wisconsin $15 million in federal funds annually if the census were adjusted. Shifting millions of dollars in federal aid from states that have relied on the 1990 census figures, when the Census Bureau itself concedes that sta-

tistical adjustment would not accurately reflect populations at subnational levels, would be imprudent and harsh.

The political impact would, if anything, be even more draconian. Testifying against adjustment before a Senate subcommittee, Wisconsin's Attorney General explained that the proposed "adjustment would unduly disrupt and delay the established political process":

> An adjusted census would require my State and other States to scrap that [local and state redistricting] process and start over with different population data. Such a change would result in confusion and delay for Congressional, State, county, city, town and village redistricting across the country. Indeed, we would run the risk of not completing our reapportionment work on time for the next election.

The Case Against Adjustment: The 1990 Census, Hearing Before the Subcomm. on Government Information and Regulation of the Senate Comm. on Governmental Affairs, 102d Cong., 1st Sess. 4 (1991) (statement of James Doyle, Attorney General, Wisconsin). And that was four years ago.

The reapportionment, by every state legislature, of their own legislative districts and every state's Congressional districts inevitably spawned an avalanche of federal court cases that only now are reaching this Court. *See, e.g., Miller v. Johnson,* —— U.S. ——, 115 S. Ct. —— (1995). Those disputes, whatever the issues and whatever the outcome, have assumed the constitutional accuracy of the 1990 census. To permit the district court even to consider, on remand, the possibility of retrospective relief would create a political and judicial nightmare.

The Census Bureau conceived the PES to help it do a better job of counting the people of America. The Bureau already has incorporated the results of the PES and its other post-census surveys into the planning for the year 2000 census. In fact, the next census may be

remarkably different than the 1990 census in concept and in methodology. Any relief granted the respondents in this case similarly should be directed to making the next census better and not to revisiting the last census—with all of the problems that would entail.

CONCLUSION

The apportionment of seats for the House of Representatives is done by "equal proportions," and redistricting within the states and the allocation of federal funds all rest on distributing the population into areas that are approximately equal. Accuracy for the decennial census requires the most accurate *proportional* distribution of the population across the country. Placing greater importance on distributive rather than numeric accuracy, the Secretary of Commerce correctly concluded that the "adjusted" data became less reliable below the national level, and the census numbers became more reliable. Accordingly, for the constitutionally mandated purposes of the census, the adjusted numbers are not only less accurate but less fair than the actual census count.

For these reasons, this Court should reverse the decision of the court of appeals.

Respectfully submitted,

BRADY C. WILLIAMSON *
DEBBIE K. LERNER
LAFOLLETTE & SINYKIN
Suite 500
One East Main Street
Madison, Wisconsin 53703
(608) 257-3911
Counsel for Amici Curiae

* Counsel of Record

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